

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TIMOTHY SCOTT TRACY**

Claimant

VS.

**WEAR TECHNOLOGY, INC.**

Respondent

AND

**TRAVELERS INDEMNITY CO. OF  
CONNECTICUT**

Insurance Carrier

Docket No. 1,061,595

**ORDER**

Claimant requested review of the November 8, 2012, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Claimant appears by Scott J. Mann of Hutchinson, Kansas. Respondent and its insurance carrier (respondent) appear by William L. Townsley, III, of Wichita, Kansas.

The Administrative Law Judge (ALJ) found claimant failed to sustain his burden of proof that he suffered personal injury by repetitive trauma arising out of and in the course of his employment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 13, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant appeals the ALJ's finding that he failed to sustain his burden of proof he suffered personal injury by repetitive trauma arising out of and in the course of his employment through June 25, 2012. Claimant did not file a brief in this appeal.

Respondent argues claimant did not suffer a personal injury by repetitive trauma arising out of and in the course of his employment. Further, respondent contends

claimant's work activities were not the prevailing factor in causing his alleged repetitive injury.

The issue for the Board's review is: Did claimant suffer a personal accident by repetitive trauma arising out of and in the course of his employment?

### **FINDINGS OF FACT**

Claimant began working for respondent, a business that builds and rebuilds screws for plastic extruders, on May 5, 1998, as a plasma transfer arc (PTA) operator. His normal working hours were from 8 a.m. to 4:30 p.m. Claimant's tasks included filling the PTA machine's hopper with powder, which required him to climb onto a step that was 1 1/2 feet off the ground. The jugs of powder, which he had to lift over his head, weighed 10 pounds each. Claimant would next start the burners on the machine and heat the screw he would be working on. He then began operating the PTA machine. He would sit at the machine, leaning forward. His head was always bent and his neck stretched out. His left hand was raised up pushing buttons on the machine. His right hand was on the machine's brake. He performed this task most of the day. When he completed a screw, which sometimes would take longer than a day, he would stand up to clean with a grinder, wrap the screw, get a hoist, and unload the screw onto a cart. His job required him to bend, twist, reach, pull and lift.

Claimant denied having a specific back injury before going to work for respondent. At times, he had complaints involving his low back and neck, for which he would obtain treatment from a chiropractor. He had not seen a medical doctor for his low back or neck complaints. He had never been taken off work or given restrictions for either his low back or neck.

At some point, claimant started to developed symptoms in his low back and neck while working for respondent. As he continued to perform his work activities, his symptoms continued to worsen until his last day worked, June 25, 2012. As he was sitting, he put his head out to watch his work, and he would get a kink in his neck and sharp pains in his lower back. He would be hunched over in pain all the time. He may have seen a chiropractor during that time, but he first sought treatment for his symptoms from a medical doctor in 2006. He was sent to physical therapy, but the pain remained the same. By 2012, it was harder for claimant to move, and he could not sleep at night. Claimant could not recall a specific injury that occurred at work; he claims he developed low back and neck problems over a period of time. He complained of his symptoms to two of his supervisors at respondent, telling them his back was hurting at work. He also spoke with Loni Troxel,<sup>1</sup> telling her his machine needed to be raised to take stress off his neck and back. At the

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<sup>1</sup> Ms. Troxel attended the preliminary hearing as a representative of respondent, but her title and job duties were not identified.

time of the preliminary hearing, claimant continued to complain of pain in his lower back that shot up the middle of his back, as well as neck pain.

Claimant reported a previous work-related low back injury in 1996 when he worked for First Brands Corporation. Claimant said he only suffered pulled muscles at that time.

Claimant testified he went to rodeos. One time, over 20 years ago, some bull riders came in and claimant ran the return chute. All he did was open the gate and let the bulls out. Claimant denied ever being a performer in a rodeo.

Claimant currently owns a motorcycle, but it has been five or six years since he last rode. He denied ever injuring his neck or back while riding a motorcycle and denied ever being involved in a motorcycle accident.

Claimant owns three horses. It has been over two years since he last rode a horse. He has been thrown from a horse but said it was long ago. He testified he never injured his back or neck from being thrown by a horse.

Claimant denied any other outside activity that injured his back or neck.

A review of claimant's medical records show that on June 2, 2006, claimant saw Dr. James Prescott, complaining of back and neck pain. The records give a history that claimant "has been doing a lot of lifting. They have been in the process of moving."<sup>2</sup> Claimant could not remember his office visit with Dr. Prescott in June 2006 and could not remember when he moved. Claimant returned to see Dr. Prescott on November 29, 2006, complaining of lumbosacral spasms that had been present for three weeks with no specific injury. Claimant told Dr. Prescott he had gone to the emergency room within a few days of his November 29, 2006, visit and x-rays taken were normal. On December 5, 2006, claimant went to ContinuCare for physical therapy at Dr. Prescott's order. Claimant was discharged from physical therapy in January 2007.

On August 30, 2010, claimant had an x-ray of his cervicothoracic spine after complaining of neck pain. The x-ray was normal for claimant's cervical spine with no evidence of significant scoliosis or fracture. The x-ray showed minimal scoliosis in the thoracic spine. There was no disc narrowing.

On September 13, 2010, claimant began physical therapy at Memorial Hospital at the order of Dr. Starkey. The records state:

The patient states that approximately 2 weeks ago he fell off a horse from approximately 8 feet up and landed on his tailbone and hit his head on the ground.

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<sup>2</sup> P.H. Trans., Cl. Ex. 1 at 5.

The patient states that he fell on his tailbone very hard and was unable to get up for 3 minutes. . . . The patient is a welder and works 12-hour shifts throughout the week, which involves running a machine in a forward sitting posture. The patient states he has no pain complaints at work. . . . The patient does have an extensive past medical history of traumatic accidents including falls, fractures, and other injuries to his low back.<sup>3</sup>

Claimant remembered falling off a horse but did not recall being treated at Memorial Hospital after.

On April 4, 2012, claimant went to his family physician, Dr. Sheila Gorman, complaining of low back pain. Although he testified he told Dr. Gorman about his work activities, that was not recorded in the office notes. Claimant told Dr. Gorman he had a “long standing history of low back pain that has been intermittent and particularly bad over the last 2 months.”<sup>4</sup> Claimant further gave a history of “multiple minor injuries over the years. He was in the military and he rode bulls, he rode motorcycles and horses. . . . He is a bowler also. He has had his back evaluated in the past.”<sup>5</sup> Dr. Gorman recommended physical therapy, and claimant was seen at ContinuCare on April 30, 2012, where he gave a history that he worked as a welder, “lifting, twisting and bending thru out the work day. Did get bucked off horse last yr.”<sup>6</sup>

Claimant again saw Dr. Gorman on May 9, 2012, at which time he reported he had been “doing some projects that require some really heavy lifting like replacing a transmission in a couple different vehicles.”<sup>7</sup> Claimant also told Dr. Gorman he did not believe he was making significant progress in physical therapy. An MRI scan taken May 24, 2010, revealed claimant had localized T12-L1 degenerative disc disease without significant stenosis and L3-4 degenerative disc disease resulting in mild to moderate neural foraminal stenosis, left greater than right.

Claimant was given an epidural injection in his low back on June 1, 2012, which claimant said did not help. On June 15, 2012, he was seen at Dr. Gorman’s office complaining of pain in his thoracic spine and neck spine with no real new injury. He described his job as sitting and leaning all the way over, which claimant believed was causing pain in his thoracic area and neck. An x-ray of claimant’s cervicothoracic spine done June 15, 2012, showed degenerative disc disease at C4-5 and C5-6.

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<sup>3</sup> P.H. Trans., Resp. Ex. A at 15.

<sup>4</sup> *Id.* at 21.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.* at 26.

On June 22, 2012, claimant was continuing to complain of low back pain and pain in his neck. He told Dr. Gorman he asked to have his machine at work raised four inches to help in his positioning. Dr. Gorman prescribed two more epidural injections; gave claimant restrictions of no bending, squatting, twisting and lifting more than 20 pounds; and referred claimant to a neurosurgeon. Claimant was given a second epidural injection on June 27, 2012. Since it provided claimant no relief, the third injection was cancelled. Respondent was unable to accommodate claimant's restrictions, and his last day of work was June 25, 2012.

Claimant was seen on July 5, 2012, by Dr. Paul Stein, at the request of claimant's attorney. Claimant complained to Dr. Stein of neck and upper and lower back pain. Claimant said he had no prior history of spinal injury or symptomatology. He told Dr. Stein he was thrown off a horse in 2010 but had suffered no significant injury. After reviewing claimant's medical records and performing a physical examination, Dr. Stein opined:

The work activity described by Mr. Tracy involves repetitive and maintained positioning of the cervical and thoracolumbar spine in order to keep his head in the welding helmet and his body in position to operate the machine. This enforced positioning on a regular basis over the course of 14 years is more than likely to have caused acceleration of the degenerative changes and repetitive aggravation of the symptomatology. In my opinion, although there are multiple factors operating here, the type and length of work activity, this represents the prevailing factor in the current symptomatology.<sup>8</sup>

Claimant was seen by Dr. John McMaster on September 4, 2012, at the request of respondent. Claimant told Dr. McMaster he had no previous problems or injuries similar to what he was then experiencing. Claimant, however, related to Dr. McMaster he had been treated by chiropractors dating back to 2004. Claimant gave no specific date of injury but said his injury occurred by doing the same thing over and over again for years. He complained of back pain involving the entire spine from his neck to his buttock area.

After performing a physical examination and reviewing claimant's medical records, Dr. McMaster diagnosed claimant with nonspecific, non-differentiated back pain. He was unable to relate the occurrence of claimant's symptoms to his occupational tasks at respondent. Dr. McMaster further stated that claimant's work activities were not the prevailing factor causing or contributing to claimant's identified medical conditions.

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<sup>8</sup> P.H. Trans., Cl. Ex. 2 at 5.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508 states in part:

(e) “Repetitive trauma” refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. “Repetitive trauma” shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

...  
(f)(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

...  
(3) (A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

...  
(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>10</sup>

### ANALYSIS

The record reflects that claimant received treatment from June 2006 to January 2007, including one trip to the emergency room in November 2006. Claimant was treated in an emergency room for neck and shoulder complaints in April 2009. In August 2010, claimant fell off of a horse, causing him to seek medical treatment for cervical, thoracic and lumbar pain. Treatment included physical therapy. Claimant returned to Dr. Gorman in April 2012. Dr. Gorman recorded a history of multiple minor injuries over the years. She also wrote that claimant was a bowler and rode bulls, motorcycles and horses. There is no mention of a work-related aggravation in Dr. Gorman's notes taken on April 4, 2012.

Dr. McMaster, the independent medical examining physician hired by respondent, found claimant's work-related activities were not the prevailing factor causing his physical problems. The ALJ sent claimant to Dr. Michael Johnson for an independent medical examination. Dr. Johnson diagnosed, *inter alia*, chronic cervical pain degenerative disc disease, chronic thoracic pain and chronic lumbar pain degenerative disc disease. Dr. Johnson wrote that claimant's work activities were not the prevailing factor in causing the listed conditions.

The only opinion finding the work activities to be the prevailing factor was from Dr. Stein. Dr. Stein noted claimant had "no prior history of spinal injury or symptomatology" and that the claimant "sustained no significant injury" from being thrown from a horse.<sup>11</sup> Both the statements contained in Dr. Stein's report are inconsistent with the medical evidence in the record.

### CONCLUSION

Based upon the foregoing, this Board Member finds that claimant failed to sustain his burden of proof that he suffered personal injury by repetitive trauma arising out of and

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<sup>9</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>10</sup> K.S.A. 2011 Supp. 44-555c(k).

<sup>11</sup> P.H. Trans., Cl. Ex. 2 at 1.

in the course of his employment through June 25, 2012, and that claimant's work activities were not the prevailing factor in causing the injury.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 8, 2012, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2013.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge